***STATES v. BOOKER. SUCH A DECISION* CONFLICTS WITH RELEVANT PRECEDENT OF OTHER UNITED STATES COURTS OF APPEALS, REQUIRING CERTIORARI REVIEW.**

U.S.S.G. § 3C1.1 provides for a two-level sentencing enhancement if a defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction" by "committing, suborning, or attempting to suborn perjury." U.S.S.G. § 3C1.1, cmt. n. 4(b). The district court applied the obstruction enhancement to Petitioner's sentence under the mandatory Guidelines system based on its finding that Petitioner's testimony during trial was perjured.

In *Blakely v. Washington*, 542 U.S. 296 (2004), the Supreme Court established that the imposition of a sentencing enhancement based upon facts neither admitted by the defendant nor found by the jury violated the defendant's Sixth Amendment right to a jury trial. The Court's subsequent decision in *United States v. Booker*, 543 U.S. ___ (2005), extended the *Blakely* holding to the federal Sentencing Guidelines, rendering the mandatory nature of the Guidelines unconstitutional and instructing that the Guidelines be deemed as merely advisory in all cases, including those that do not involve a Sixth Amendment violation. Thus, the Eleventh Circuit has recognized that there are two types of *Booker* error: (1) a Sixth Amendment error – the error of imposing a sentencing enhancement based on judicial findings that go beyond the facts admitted by the defendant or found by the jury, and

(2) a statutory error – the error of being sentenced under a mandatory guidelines system. *See, e.g., United States v. Shelton*, 400 F.3d 1325, 1330-31 (11th Cir. 2005).

Booker explicitly states that the remedial interpretation of the Guidelines must apply to all cases on direct review, and instructs that reviewing courts are to apply ordinary prudential doctrines, such as whether the issue was raised below and whether it fails the "plain-error" test, in determining whether an appeal should be remanded for resentencing. To demonstrate plain error, the defendant must show (1) an error, (2) that is plain, and (3) that affects substantial rights." *United States v. Cotton*, 535 U.S. 625, 631 (2002). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

Petitioner advanced such a showing in his Motion to Remand for Resentencing in light of *Booker*. The Eleventh Circuit Court of Appeals, however, failed to consider the issue in its Opinion, stating only: "Appellant's motion to remand for resentencing in light US v. Booker is denied."

Because this case was pending on direct review when *Booker* was decided, the holdings of *Booker* are applicable to the case at bar. *See, e.g., United States v. Barnett*, 398 F.3d 516, 525-30 (6th Cir. 2005). A potential reversible constitutional error occurred in this case when the district court enhanced Petitioner's sentence on the basis of a fact he did not admit—that he willfully obstructed justice. *See United States v. Paz*, 405 F.3d 946, 948 (11th Cir.

2005). Moreover, because Petitioner's sentence was enhanced under the mandatory Guidelines system, the district court committed *Booker* statutory error, which was plain at the time of appellate review. *See Shelton*, 400 F.3d at 1330-31.

Although the Eleventh Circuit has ruled that an assessment of whether the defendant has been prejudiced by a *Booker* error must account for the fact that any resentencing will be conducted under an advisory Guidelines regime, *see United States v. Rodriguez*, 398 F.3d 1291, 1301 (11th Cir. 2005), this approach has been rejected by other circuits relying on Supreme Court precedent:

> According to the Eleventh Circuit, our refusal to incorporate the remedial scheme into our prejudice analysis is wrong because it disconnects the error to be remedied on remand from the decision of whether there is to be a remand. . . . This language demonstrates a fundamental misunderstanding of what it means for an error to affect substantial rights. Any inquiry into whether a Sixth Amendment error affected a defendant's substantial rights must take as a given the Sixth Amendment limitation that the district court improperly exceeded. This much is clear from [*Kotteakos v. United States*, 328 U.S. 750 (1946)], in which the Court noted that the prejudice "inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It

> is rather, even so, whether the error itself had substantial influence."

United States v. Hughes, 401 F.3d 540, 547 (4th Cir. 2005) (quoting *Kotteakos*, 328 U.S. at 765). In accordance with the logic expressed in *Hughes*, other circuits have consistently held that a remand to the district court for determination of whether to resentence is generally necessary in order to undertake the proper application of the plain-error doctrine in a direct appeal involving a pre-*Booker* sentence. *See United States v. Crosby*, 397 F.3d 112, 118 (2nd Cir. 2005); *United States v. Davis*, 397 F.3d 173, 183 (3rd Cir. 2005) reh'g denied, 407 F.3d 162 (3rd Cir. 2005) (en banc); *United States v. Bradley*, 400 F. 3d 459, 462-63 (6th Cir. 2005); *United States v. Woodard*, 408 F.3d 396, 398-99 (7th Cir. 2005).

Furthermore, other circuits have chosen to exercise their discretion under the fourth factor of plain-error analysis to vacate the defendant's sentence, recognizing that "refusing to allow [a defendant] to be resentenced would leave [the defendant] incarcerated for a longer period than that to which the district court would have sentenced him under an advisory regime." *See, e.g., United States v. Betterton*, 2005 WL _____ (8th Cir. August 2, 2005). This alone is sufficient to seriously affect the fairness, integrity, and public reputation of the judicial proceedings that placed the defendant in prison. *Id.* The possibility that a defendant will receive the same sentence on remand "is not enough to dissuade [appellate courts] from noticing the error." *United States v. Ebersole*, 411 F.3d 517 (4th Cir. 2005).

Whereas the doctrine of *stare decisis* is not an inexorable command, it is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). This is especially true in a case, such as the one at bar, where one circuit court has defiantly refused to even consider remanding in light of *Booker* when other circuits have consistently taken *Booker* into account on direct appeal. *Cf. Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (holding that *stare decisis* did not apply, and the Court was "free to address the issue on the merits" because prior case law "never squarely addressed the issue, and at most assumed the applicability of the . . . standard" in question). For that reason, the Eleventh Circuit's decision is so adverse to the accepted and usual course of judicial proceedings that Certiorari review is required. It is, therefore, respectfully requested that this Honorable Court exercise its authority to fashion relief in the interest of justice.

CONCLUSION

The aforementioned error creates a serious question of confidence in the fairness, integrity, and public reputation of Petitioner's sentence. Accordingly, the Eleventh Circuit's Opinion in this matter should be vacated and remanded for further consideration in light of *United States v. Booker*, 543 U.S. ___ (2005).

WHEREFORE, Petitioner prays this Honorable Court will grant the present request, and grant the Writ of Certiorari.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-10829-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN F. THOMPSON,III,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of G rgia

Before EDMONDSON, Chief Judge, ANDERSON AND

PRYOR, Circuit Judges.

Appellant's motion to remand for resentencing in light of US v. Booker is denied.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-10829-DD
Non-Argument Calendar

D.C. Docket No.02-00706-CR-1-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN F. THOMPSON,III,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Georgia

(May 27, 2005)

Before EDMONDSON, Chief Judge, ANDERSON AND PRYOR, Circuit Judges.

PER CURIAM:

John F. Thompson, III, appeals his convictions and sentences for conspiracy to commit mail fraud, 18 U.S.C. §§ 371, 2; mail fraud, 18 U.S.C. §§ 1341, 2; and money laundering, 18 U.S.C. §§ 1957, 2. Thompson, who owned timber supply businesses in Georgia, was charged with conspiring to defraud saw mill companies by using false timber scale tickets to sell phantom timber loads. No reversible error has been shown; we affirm.

Thompson first challenges the district court's imposition of a two-level enhancement for obstruction of justice, U.S.S.G. § 3C1.1. He asserts that he should not be punished solely for testifying in his defense at trial. And Thompson maintains that the district court failed to address the elements of perjury with sufficient specificity, citing United States v. Dunnigan, 113 S.Ct. 1111 (1993). Thompson further contends that he did not obstruct justice willfully: testimony showed that he cooperated with government agents and that he merely was confused by the government's questions during the testimony.

When a district court imposes an enhancement for obstruction of justice, we review the district court's factual findings for clear error and its application of the sentencing guidelines to those facts de novo. United States v. Uscinski, 369 F.3d 1243, 1246 (11th Cir. 2004). Although it is preferable for a district court to make specific findings of fact when applying U.S.S.G. § 3C1.1, a remand is unnecessary "if the record clearly reflects the basis of enhancement." Id.

The Guidelines authorize a two-level enhancement if "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction." U.S.S.G. § 3C1.1. The enhancement applies to the commission of perjury. U.S.S.G. § 3C1.1, comment. (n.4(b)).

The district court enhanced Thompson's sentence based on the court's belief that Thompson gave perjured testimony. The court pointed to Thompson's testimony that he thought that L. B. Howard, a purported logger who

sold legitimate loads of timber to Thompson, was a real person. The court determined that it could not "square" Thompson's testimony with the other evidence at trial and with the jury's verdict on the fraud counts.

The district court committed no error in imposing an obstruction enhancement. Thompson testified that he did not engaged in a conspiracy with Annie Bailey, a timber scale house worker, to defraud Proctor & Gamble and then Weyerhaeuser, who successively owned the timber mill in Barnesville, Georgia, to which Thompson sold the phantom timber loads. But Bailey testified that she agreed with Thompson to produce false timber tickets in 1988, that Thompson provided her with the necessary material and information to produce the false tickets, and that Thompson paid her in cash and by check for the phantom timber loads. The record is sufficient to support the district court's determination and to support an obstruction enhancement based on the perjury. See Dunnigan, 113 S.Ct. at 1116 (stating that a witness commits perjury within the meaning of §3C1.1 when he testifies falsely about a material matter with the willful

intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory). And Thompson failed to request more specific findings on his perjurious statements: "[h]aving failed to do so, [he] cannot now complain to this court." United States v. Hubert, 138 F.3d 912, 915 (11th Cir. 1998).[1]

Thompson argues second that the district court improperly excluded proffered defense testimony from Stanley Wheelous, a senior open-market timber buyer for MeadWastvaco ("Mead"), about the timber industry's custom of mixing timber loads on "special price contracts." Thompson contends that the

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[1] Citing United States v. Banks, 347 F.3d 1266 (11th Cir. 2004), Thompson also contends that the government did not show how his statements to government agents during the investigation were a significant hindrance to the investigation. But the district court based the enhancement on its determination that Thompson's trial testimony were perjured. Thompson's reliance on Banks thus is misplaced.

[2] The government presented testimony (1) that Weyerhaeuser paid Thompson for special price contracts that required the timber to come from a specific tract of land, and (2) that Thompson

government introduced evidence suggesting he fraudulently violated the special price contracts; the district court should have allowed him to present about the industry custom to show that his conduct was legitimate.

We review a district court's evidentiary rulings for a clear abuse of discretion. United States v. Tinoco, 304 F.3d 1088, 1119(11th Cir. 2002), cert. denied, 123 S.Ct. 1484 (2003). Federal Rule of Evidence 701 allows a lay person to testify about opinions or inferences that "are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed,R.Evid. 701.[3] Under this version of Rule 701, lay opinion testimony witnesses may

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violated these contracts by selling loads of timber from mixed tracts of land.

[3]We need not address the government's argument that Wheelous was not qualified as an expert witness, under Fed.R.Evid.702: Thompson concedes that Wheelous was not being introduced as an expert witness.

testify "based on their particularized knowledge garnered from years of experience within the field." Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., 320 F.3d 1213, 1223 (11th Cir. 2003).

Wheelous had over 30 years' experience in the timber field, and he had been a buyer for Mead for 15 years. But Thompson asked Wheelous only about Mead's tract trade policies. Thompson did not establish that Wheelous had particularized knowledge of the special price contract practices of other timber companies, including Proctor & Gamble and Weyerhaeuser, the companies that operated the Barnesville mill. The district court did not abuse its discretion in excluding Wheelous's testimony.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-10829-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN F. THOMPSON, III,

Defendant-Appellant

Appeal from the United States District Court for the
Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered:	May 27, 2005
For the Court:	Thomas K. Kahn, Clerk
By:	Gilman, Nancy